

ENERGY PERFORMANCE CONTRACT

BETWEEN

STATE OF RHODE ISLAND DEPARTMENT OF ADMINISTRATION

AND

Preamble

This Energy Performance Contract (hereinafter "Contract") is made and entered into as of _____ ("Effective Date") by and between _____ (hereinafter "ESCO"), a _____ corporation having its principal offices at _____, with offices at _____, and the State of Rhode Island, Department of Administration (hereinafter "the Customer"), having its principal offices at One Capitol Hill, Providence, Rhode Island 02908, for the purpose of furnishing certain equipment and work specified herein ("Work") designed to improve thermal efficiency, conserve energy, conserve water, reduce waste water, reduce operating costs and, when specified, generate electrical power at Customer properties as listed in Attachment 1 (hereinafter the "Premises"). This Contract is conditional upon the Customer obtaining financing from a reasonably acceptable lender or lessor in an amount not less than the Contract Price as described in Attachment 3 upon such terms as are satisfactory to the Customer, provided Customer shall diligently pursue such financing upon such terms as are customary, reasonable and in compliance with pertinent laws and regulations including, without limitation, financing arranged by ESCO.

1. Definitions

The following terms used within this Contract are defined as follows:

Energy Baseline - A calculation or measure of each type of energy consumed (or, as appropriate, water consumed or operating and maintenance costs) in existing facilities at the Premises prior to the installation of energy conservation measures or energy efficiency measures as described in Attachment 4.

Energy Cost Savings Measures (ECMs)/Operating Cost Savings Measures (OCMs) - A set of activities that result in savings of energy, water or operating and maintenance costs at the Premises and described in detail in Attachment 2. OCMs include any expenses that are eliminated, avoided and stipulated as a result of the installation or modification of equipment, or services performed by ESCO. OCMs do not include any savings that are realized solely because of a shift in the cost of personnel or other similar short-term cost savings.

Energy Savings - The reduction in energy consumption or demand resulting from ESCO's ECMs/OCMs and shall include electric energy savings, gas energy savings, operational savings, maintenance savings, water consumption savings and any other savings achieved as a result of the Work as shall be determined after adjustments for variations in other factors that might substantially affect the data such as weather, changes in operating practices or other external influences. Energy savings shall be determined by comparing the Energy Baseline with the energy consumed (or demand) after ESCO has implemented ECMs/OCMs. A description of the promised savings and the terms of the Performance Guarantee with respect to promised Energy Savings is included in Attachment 4.

Final Completion - The date on which ESCO warrants by written notice in the form provided in Attachment 10-B that all Work is completed including all remaining items of Work identified in the notice contained in Attachment 10-A delivered at Substantial Completion.

Project Acceptance - The date the Customer approves all Work warranted by ESCO to be at Final Completion, including all remaining items of Work identified in the notice delivered at the Substantial Completion date. Project Acceptance will not be made until ESCO has

successfully demonstrated, through the Guidelines for Project Acceptance as described in Attachment 11-A, that all ECMs/OCMs are achieving all of the stated savings in Attachment 4. Project Acceptance shall be by written notice in the form provided in Attachment 11-B.

Substantial Completion - The date on which ESCO warrants by written notice in the form provided in Attachment 10-A that installation of ECMs/OCMs is substantially complete and the Customer has accepted such ECM/OCM as installed.

2. Contract Documents

It is understood and agreed that the Contract consists of this document and all attachments, schedules and any amendments or addenda thereto. In addition, all requirements set forth in the request for proposals/qualifications (RFP) issued by Customer and in ESCO's response, unless specifically excluded, shall be part of the Contract.

3. Representations and Warranties

3.01 Representations and Warranties of Both Parties

Each party hereto represents and warrants to the other that:

- (i) it has adequate power and authority to conduct its business as presently conducted or contemplated hereby to be conducted, to enter into this Contract and to perform its obligations hereunder;
- (ii) it possesses full authority to execute and deliver this Contract and that it does not contravene any applicable law, rule or regulation;
- (iii) its execution, delivery and performance of the Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized and it constitutes its legal, valid and binding obligation;
- (iv) its execution, delivery and performance of this Contract will not result in a breach or violation of, or constitute a default under any agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected; and
- (v) it has not received any notice, nor to the best of its knowledge, is there pending or threatened any notice of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders that would materially and adversely affect its ability to perform hereunder.

3.02 Representations and Warranties of ESCO

ESCO hereby warrants, represents and promises that:

- (i) before commencing performance of the Contract ESCO shall have
 - (a) become qualified, licensed or otherwise permitted to do business in the State of Rhode Island and
 - (b) provide proof and documentation of

such qualification and of all required insurance and bonds pursuant to this Contract to the extent not included in Attachment 9;

- (ii) ESCO shall use subcontractors who are qualified, licensed and bonded in this State and approved by Customer in writing to perform the Work so subcontracted pursuant to the terms hereof;
- (iii) ESCO has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Contract;
- (iv) equipment installed as part of the ECMs/OCMs will meet or exceed the equipment standards set forth in Attachment 5 and acknowledges that Customer reserves the right to reject all non-conforming goods and to cause their return for credit or replacement at Customer's option;
- (v) the equipment installed as part of the ECMs/OCMs is or will be compatible with all other Premises' mechanical and electrical systems, subsystems, or components with which such equipment interacts, and that, as installed, neither such equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of equipment installation or operation;
- (vi) it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the work and perform its obligations under the Contract and has no outstanding and delinquent debt owed to the State of Rhode Island or any political subdivision thereof;
- (vii) it has not, directly or indirectly, participated in any collusion or otherwise taken any action in restraint of full competitive bidding with respect to this Contract or the solicitation process leading to this Contract; and
- (viii) it has not paid, and agrees not to pay, any bonus, commission, fee or gratuity to any employee or official of the State of Rhode Island for the purpose of obtaining this Contract or any other contract or award issued by the State and that no commission or other payment has been or will be received from or paid to any third party contingent upon the award of any contract by the State except as previously communicated to the State Purchasing Agent in writing (and ESCO acknowledges that, pursuant to state regulation, subsequent discovery of non-compliance with this provision constitutes sufficient cause for immediate termination of this Contract and other remedial action).

3.03 Representations and Warranties of the Customer

Customer hereby represents and warrants that:

- (i) it is a tax exempt entity and, therefore, the Work required by this Contract may be subject to tax exemption for Rhode Island sales or use tax purposes upon compliance with the appropriate process.

4. Price and Terms

4.01 Contract Price

ESCO will submit a schedule of values to Customer for portions of the Work that ESCO shall have already performed on a form issued by the American Institute of Architects ("Schedule of Values"). Customer shall approve and authorize release of construction financing less ten percent (10%) retainage from the Escrow Agent/Trustee to the ESCO within thirty (30) days following Customer's receipt of a Schedule of Values. Customer shall not be required to approve release of construction financing for Work yet to be performed. In the event that the Customer disputes a portion of a Schedule of Values, Customer shall timely authorize the release of construction financing in an amount equal to the undisputed portion of the Schedule of Values. In the event that Customer disputes a Schedule of Values or a portion of the Schedule of Values, Customer shall indicate its reason for the dispute in writing to ESCO within fourteen (14) days of the receipt of the Schedule of Values and the parties will negotiate in good faith in an attempt to resolve the dispute prior to the expiration of the thirty (30) day period. If the parties cannot resolve the dispute within such thirty (30) day period, Late Payment interest shall begin to accrue pursuant to section 4.02 hereof but such Late Payment interest shall only be released to ESCO in the event that the dispute is eventually resolved in favor of ESCO in accordance with Section 9.01's Dispute Resolution procedure.

ESCO shall be responsible for paying all other taxes and tariffs of any sort related to the Work. ESCO shall be responsible to pay for all labor, materials, equipment, tools, construction, equipment and machinery, fuel, transportation and other facilities and services necessary for the proper execution and completion of the Work. Following Final Acceptance, the Customer shall pay ESCO for management and monitoring and verification services as described in Attachment 3. The continuing payment for monitoring and verification services and any operating services described in Attachment 2 shall be a condition for the continuing effectiveness of the Performance Guarantee. ESCO shall provide full disclosure of all costs relating to the Work, including costs to subcontractors and vendors. ESCO shall provide a listing of direct costs including copies of PO's for vendors and subcontractors and a breakdown of indirect costs associated with the project.

4.02 Late Payment

Interest shall accrue on any past due balanced owed to either party hereunder, including for the Work or pursuant to the Performance Guarantee, at the rate of one percent (1%) per month (or the highest rate not prohibited by law), whichever is lower. This remedy shall be in addition to, and not exclusive of, any other remedy available under this Contract or applicable law.

4.03 Contract Termination

This Contract shall be effective and binding upon the parties immediately upon its execution. Unless otherwise terminated, including pursuant to Section 7.0 of this Contract, or agreed to in writing pursuant to this Contract, this Contract shall terminate fourteen (14) years after Project Acceptance.

5. The Work

5.01 Time for Performance and Project Acceptance

ESCO shall commence Work within thirty (30) days of the receipt from Customer of the Notice to Proceed, which Customer shall send upon closing financing. ESCO shall substantially complete the Work consistent with the schedule set forth in Attachment 2. Except as otherwise provided herein, extension of dates to commence or complete Work shall be granted at the sole discretion of the Customer. Approval for an extension of dates to commence or complete Work shall not be unreasonably withheld if the cause for an extension is pursuant to Sections 5.03, 5.06, 5.08, 5.12, 5.13, or 9.02.

Once all of the ECMs/OCMs are implemented, all items on the Checklist for Project Acceptance in the form provided in Attachment 11-A are complete and all items that Customer previously deemed not to be in compliance with the requirements set forth in this Contract have been corrected, ESCO shall submit and deliver to Customer a Delivery and Acceptance Certificate Upon Final Completion in the form provided in Attachment 10-B evidencing in reasonable detail that all items on the Checklist for Project Acceptance located in Attachment 11-A are complete and that all items that Customer deemed not to be in compliance with the requirements set forth in this Contract have been corrected and which shall also be accompanied by a Final Commissioning Report.

Upon receipt by Customer of Delivery and Acceptance Certificate Upon Final Completion, Customer shall have thirty (30) days to complete review of the ECMs/OCMs in accordance with the Guidelines for Project Acceptance in the form provided in Attachment 11-A. The Customer shall notify the ESCO of each item that does not satisfy the Guidelines for Project Acceptance within thirty (30) days of receipt of the Delivery and Acceptance Certificate Upon Final Completion Form or Final Completion will be deemed to have been achieved. The Customer reserves the right to reject the work if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes or is otherwise not in compliance with the terms of this Contract. Upon correcting all items identified by Customer as not satisfying the Guidelines for Project Acceptance, ESCO shall submit and deliver to Customer a new Delivery and Acceptance Certificate Upon Final Completion. Customer shall have an additional twenty-one (21) days to complete review of the ECMs/OCMs in accordance with the Guidelines for Project Acceptance upon receipt of a new Delivery and Acceptance Certificate Upon Final Completion.

Project Acceptance shall be evidenced by the Customer submitting and delivering to the ESCO the Delivery and Acceptance Certificate Upon Project Acceptance in the form provided in Attachment 11-B, the delivery of which will indicate that the Final Commissioning Report.

In the event that Attachment 2 includes a provision for liquidated damages in the event that ESCO does not attain Final Completion by the date of Final Completion, then such liquidated damages shall be Customer's sole remedy for any such delay in the completion of the Work.

5.02 Specifications of Work

ESCO's obligations hereunder are specified in Attachment 2 and related drawings and plans and any subsequent revisions thereto ("Scope of Work"), as approved by

the Customer. Excluded from the Work are any modifications or alterations to the properties not expressly included within the Scope of Work. The requirements of all applicable laws, regulations and codes of federal, state, and local town or city government shall be met at all times. Additional construction or operation requirements at the Premises, if any, are described in Attachment 7. All Work shall be performed in a good and workmanlike manner. Time is of the essence with respect to the Work.

5.03 Construction Procedures, Changes to Work and Coordination

ESCO shall supervise, coordinate and direct the Work using ESCO's best ability, skill, attention, and oversight. ESCO, in consultation with Customer, shall be responsible for the construction means, methods, techniques, sequences, and procedures. The Customer shall review all proposed modifications to the building and systems and must approve of same prior to commencement of any Work; such approval will be made in a timely manner and will not be unreasonably withheld. No change to the scope or specifications of Work shall be made without the written consent of the Customer, in the form of a revision to the Scope of Work. If ESCO fails to correct Work which is not in accordance with the specifications or persistently fails to meet specifications herein, Customer may order ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated. ESCO shall perform the Work in such a manner as not to harm the structural integrity or operating systems of any building and shall repair and restore any damage caused by the Work at ESCO's expense. ESCO shall not create or allow to continue any condition deemed to endanger health or safety as defined in Section 6.01 and if such a condition exists Customer shall have the right to exercise the remedies described therein. ESCO shall supply to the Customer the telephone number of a responsible person who may be contacted during non-work hours for emergencies arising in connection with or affecting the Work. ESCO shall coordinate any utility hookups provided by others under a separate agreement at no additional cost or expense to the Customer. ESCO acknowledges that there is sufficient space within the Premises for the performance of the Work.

5.04 Relationship with Maintenance Staff

ESCO shall cooperate with Customer's operating and maintenance personnel, train said personnel in operation and maintenance of any equipment installed as part of the Work, and coordinate the Work on a planned and programmed basis including the specific actions described in Attachment 2. ESCO shall deliver a preventive maintenance schedule and procedures for any equipment installed as part of the Work.

5.05 Material and Equipment Installed

The Customer shall make the final determination whether any material or equipment installed is as specified in the Scope of Work or, if appropriate, ESCO's Response to the RFP, which is incorporated in this Contract by Section 9.14 below. No substitution of any material or equipment specified shall be made without the written consent of the Customer in the form of a revision to the Scope of Work, and any such substitution shall be at least equal in quality, finish, durability, serviceability and performance for the purpose intended. If alternative material or equipment is proposed, ESCO must update any and all software associated with the ECMs/OCMs, the Work or the measurement of savings. Customer reserves the right to reject all non-conforming goods and services and to direct ESCO to replace or credit the Customer, at Customer's election. Failure by Customer to discover latent defects or concealed damage or non-conformance shall not foreclose Customer's right to subsequently reject the goods or services delivered pursuant to this Contract. Formal or informal acceptance by the Customer of

non-conforming goods or services shall not constitute a precedent or waiver with respect to successive receipts of goods and services. If ESCO fails to promptly cure the defect or replace nonconforming goods or services, the Customer reserves the right to cancel the Contract, contract with a different entity for the goods and services to be provided herein and to invoice ESCO for any differential in price.

ESCO shall install and, when applicable, operate and maintain, or, if specified in the Scope of Work, train Customer personnel to operate and maintain equipment in a manner that will provide standards of service to meet requirements of Section 5.02 and equipment manufacturers' literature, specifications and instructions. ESCO will service and maintain the ECMs/OCMs described in Attachment 2 and Customer shall pay ESCO for such services during the term of this Contract as provided in Attachment 3. Except for ECMs/OCMs or other equipment that is to be serviced and maintained by ESCO as provided in Attachment 2, Customer shall be responsible for servicing and maintaining equipment at the Premises. ESCO shall prepare and furnish at least three (3) maintenance manuals that include product data and which are subject to acceptance by the Customer for all equipment installations at the Premises.

5.06 Asbestos and Hazardous Materials

ESCO will be responsible for proper disposal of construction demolition debris that does not contain Hazardous Materials, as defined herein. ESCO will be responsible for proper disposal of all ballasts containing or suspected of containing PCBs and fluorescent lamps containing mercury. Disposal plans must be documented and appropriate transportation and disposal documents prepared before disposal commences and actual disposal must be documented to Customer immediately after disposal.

The Customer recognizes that in connection with the Work, installation and/or service or maintenance of equipment and/or systems at the Customer's facilities, ESCO may encounter, but is not responsible for, any Work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, or (ii) mold, materials containing mold, or the existence, use, detection, removal, containment or treatment thereof, or (iii) pollutants, hazardous wastes, hazardous materials, contaminants (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof.

The materials and activities listed in the foregoing sentence are hereinafter referred to as "Excluded Materials and Activities". The Customer agrees that if ESCO's performance of any Work under this Contract involves Excluded Materials and Activities, upon receipt of any and all appropriate funding and approval, the Customer will perform or arrange for the performance of such Work and will bear the sole risk and responsibility therefore. In the event ESCO discovers Hazardous or Excluded Materials, ESCO will immediately cease Work, remove all ESCO personnel or subcontractors from the site, and notify the Customer. The Customer will be responsible to handle such Materials at the Customer's expense. ESCO will undertake no further Work at the facility except as authorized by the Customer in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Customer will not constitute a default by the Customer.

ESCO will be solely responsible for any hazardous or other materials, including without limitation those listed in this paragraph, that it may bring to the site.

5.07 Subcontracting and Assignments

- 1) ESCO may elect to use subcontractors in meeting its obligations hereunder. Customer shall approve all subcontractors and outside professionals in advance which approval shall not be unreasonably withheld or delayed. ESCO shall be responsible for the conduct, acts and omissions, whether intentional or unintentional, of its subcontractors, employees, agents, invitees or suppliers. ESCO agrees to bind each of its subcontractors to the terms of ESCO's obligations under Sections 5.01 - 5.06, 5.08, 5.09, 5.14 - 5.16, 8.01 - 8.07, 9.03, 9.04, 9.06 and 9.10 of this Contract. Nothing in this Contract shall create any contractual relationship between any subcontractor, employee, agent, invitee or supplier and the Customer.
- 2) ESCO shall not assign this Contract in whole or in part to any other party without first obtaining the consent of Customer. Notwithstanding the foregoing, ESCO may assign, without obtaining the consent of Customer, its rights for payments under this Contract to any financial institution, lender or investor in connection with a leasing or financing arrangement for the ECMs/OCMs. ESCO will notify Customer thirty (30) days prior to any such assignment.

5.08 Delays

If ESCO is delayed in the commencement or completion of any part of the Work due to events beyond ESCO's control and without the fault or negligence of ESCO, including but not limited to fire, flood, extended labor disputes, unusual delays in deliveries, unavoidable casualties, abnormal adverse weather, war, and acts of God, or due to Customer's actions or failure to perform its obligations under this Contract, then ESCO will notify Customer in writing of the existence, extent of, and reasons for such delay. ESCO shall have no claim for additional compensation on account of such delays but ESCO and Customer may extend the contract time by revision to the Scope of Work for such reasonable time as they shall agree. If Customer determines that a delay described in the first sentence of this section will result in ESCO not completing the Work for a period of ninety (90) days or more, then Customer or ESCO may terminate this Contract and the Customer shall pay ESCO for the portion of the Work completed up to the Contract termination date.

5.09 Equipment Location and Access

The parties understand and agree that the Premises will be occupied during construction. ESCO shall take all necessary precautions to ensure the public safety and convenience of the occupants during construction and Customer shall cooperate with ESCO's reasonable requirements and related requirements described in Attachments 2 and 4. ESCO shall complete the Work in accordance with the schedule in Attachment 2. ESCO shall use sufficient personnel and adequate equipment to complete the Work pursuant to Section 5.01. The Work must be completed in a continuous uninterrupted operation on the days and between the hours specified in Attachment 7, unless otherwise authorized in writing by the Customer. No Work is to be done on holidays, Saturdays, or Sundays except as contemplated in Attachment 7, the Scope of Work in order to maintain the Standards of Comfort described in Attachment 8 or in the event of emergencies unless otherwise approved by Customer. The Customer will provide access to the Premises at the times agreed upon and make all reasonable provisions

for ESCO to enter the Premises where Work is to be performed so that Work may be performed in an efficient manner.

ESCO is responsible for the security of partially completed work and for uninstalled materials or equipment stored at Customer properties. Only materials and equipment intended and necessary for immediate use shall be brought into the buildings. Equipment and unused materials shall be removed from each building by the end of each workday unless overnight storage is provided for within the Scope of Work. The Customer shall provide if available, without charge, a mutually satisfactory location or locations for the storage and operation of materials and equipment and the performance of the Work, including a location for staging and mobilization.

Flammables and combustibles shall be stored only in accordance with the requirements of relevant statutes, regulations, NFPA standards and Customer procedures. In the event that the Customer is unable to provide a satisfactory location for the storage of flammables and combustibles, then ESCO shall provide and pay for suitable storage.

5.10 Permits and Fees

ESCO shall secure and pay for building and other permits and governmental fees, licenses, and inspections necessary for proper performance and completion of the Work that are required by federal, state, or town or city governments. In the event that fees for any permits are reduced or waived by request, standing or intervention of the Customer, then, at the Customer's option, the amount of the savings of the fee shall be deducted from the line item in the Work budget and added to the contingency line item or the Contract Price reduced by that amount.

5.11 Utilities

The Customer shall provide and pay for water, heat, fuel and utilities consumed by ESCO or in any additional equipment that may be used by ESCO during performance of the Work, including, for example, generators. ESCO shall install and pay for any facilities or modifications not already in existence that are necessary to access such water, heat, and utilities during the Work.

5.12 Concealed or Unknown Conditions

If ESCO finds conditions during the Work that are subsurface or otherwise concealed physical conditions that differ materially from those indicated on the drawings or are unknown physical conditions of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in similar construction activities, ESCO shall notify Customer of such conditions promptly, prior to significantly disturbing the same, and in no event later than one (1) business day after first observing the conditions. Such conditions may include, but are not limited to, water damage, termite damage, or structural building defects. If such conditions differ materially and cause an increase in ESCO's cost of, or time required for, performance of any part of the Work, ESCO shall submit a written estimate of the material and labor cost increase and time delay. If the Customer concurs with the need, cost estimate, and time delay, Customer and ESCO shall make an equitable adjustment in the Contract Price or Time for Performance and Final Completion, or both. Pursuant to Section 5.08 above, ESCO shall not be entitled to damages for delay beyond Customer's control.

5.13 Casualty, Condemnation, Damage

If any fire, flood, other casualty, or condemnation renders a portion of any property described in Attachment 1 unsuitable for habitation or destroys a substantial part of the area within which the Work is to be performed or which the Work affects, the Customer and ESCO may terminate or modify this Contract by mutual agreement. The Customer shall pay ESCO for all Work completed to the date of termination. If any materials or equipment are damaged by the negligence or willful misconduct of an employee, agent or invitee of Customer, Customer shall repair or replace said item within a reasonable period of time, or, adjust the Contract Price to pay for repair or replacement or adjust Time for Performance and Final Completion, or both.

5.14 Standards of Service and Comfort

The facility performance requirements of service and comfort applicable to the Premises for heating, cooling, hot water, ventilation and lighting are stated in Attachment 8 ("Standards of Comfort") and shall apply throughout the Contract. If ESCO is unable to meet these Standards of Comfort for any reason, the Customer and ESCO shall mutually agree upon an appropriate adjustment to Energy Savings, the price paid for the Work or any corrective measures that shall be provided and paid for by ESCO.

5.15 Shutdown of Services

ESCO hereby acknowledges that continuous operation of services, including but not limited to heat, water, domestic hot water, electricity, gas, sanitary facilities, elevators, fire alarms or protections, and access to the property, or common areas is essential to the operation of the Customer's properties as reflected in the Standards of Comfort. If any such service, or access to the property, or any common area is to be discontinued for any period of time in order to perform the Work (including actions described within the Scope of Work), ESCO shall give the Customer as much notice in writing as is practicable, but in no event less than seven (7) days in which event the Customer shall, by written response, approve unconditionally or with conditions such shutdown of services and the timing thereof. The use of any portion of the Premises by ESCO for parking or staging areas for the Work shall be expressly approved by Customer prior to the Commencement of the Work. Such conditional approval may include a requirement for ESCO to provide and pay for temporary services, may limit the time period for which services or access may be shut down, or may require other actions, accommodations or expenditures on the part of ESCO. With respect to fire alarm or other fire protections, ESCO shall also notify the local fire department of any shutdown of service and notify the fire department when such service is restored.

The Customer acknowledges that such shutdowns may be necessary to perform the Work from time to time and will not unreasonably withhold approval. The Customer agrees to communicate with occupants on plans to shut down services or access and temporary measures, if any, which will be made in such circumstances.

5.16 Indemnification and Limitation of Liability (Non-Patent or Copyright)

ESCO shall be responsible for the Work and take all precautions for preventing injuries to persons and property in or about the Work and shall bear the costs of all losses or damages resulting from or on account of the Work. ESCO shall pay or cause payment to be made for all labor performed or furnished and for all material used or employed in carrying out

this Contract. ESCO shall assume the defense of, indemnify and hold harmless the Customer and its officers and agents from all claims relating to:

- 1) Labor performed or furnished and materials used or employed for the Work;
- 2) Injuries to any person received or sustained by or from ESCO and its employees, subcontractors and its employees, any agents, suppliers and invitees in doing the Work, or as a consequence of any improper materials, implements of labor used or employed therein; and
- 3) Any act, omission, or neglect of ESCO and any employees, subcontractors and employees, agents, suppliers and invitees.

Anything herein notwithstanding, in no event shall either Customer or ESCO be liable to the other party for special, indirect, incidental or consequential damages, including commercial loss, loss of use, or lost profits, even if either party has been advised of the possibility of such damages.

5.17 Indemnification (Patent and Copyright)

- (a) ESCO will, at its own expense, defend or at its option settle any suit or proceeding brought against Customer in so far as it is based on an allegation that any Work (including parts thereof), or use thereof for its intended purpose, constitutes an infringement of any United States patent or copyright, if ESCO is promptly provided Notice and given authority, information, and assistance in a timely manner for the defense of said suit or proceeding. ESCO will pay the damages and costs awarded in any suit or proceeding so defended. ESCO will not be responsible for any settlement of such suit or proceeding made without its prior written consent. In case the Work, or any part thereof, as a result of any suit or proceeding so defended is held to constitute infringement or its use by Customer is enjoined, ESCO will, at its option and its own expense, either: (i) procure for Customer the right to continue using said Work; (ii) replace it with substantially equivalent non-infringing Work; or (iii) modify the Work so it becomes non-infringing.
- (b) ESCO will have no duty or obligation to Customer under Section 5.17(a) to the extent that the Work is: (i) modified by Customer or its contractors after delivery; or, (ii) combined by Customer or its contractors with items not furnished hereunder and by reason of said design, instruction, modification, or combination a suit is brought against Customer. In addition, if by reason of such modification or combination, a suit or proceeding is brought against ESCO, unless expressly prohibited by law, Customer shall protect ESCO in the same manner and to the same extent that ESCO has agreed to protect Customer under the provisions of Section 5.17(a) above.
- (c) THIS SECTION 5.17 IS AN EXCLUSIVE STATEMENT OF ALL THE DUTIES OF THE PARTIES RELATING TO PATENTS AND COPYRIGHTS, AND DIRECT OR CONTRIBUTORY PATENT OR COPYRIGHT AND OF ALL THE REMEDIES OF CUSTOMER RELATING TO ANY CLAIMS, SUITS, OR PROCEEDINGS INVOLVING PATENTS

AND COPYRIGHTS. Compliance with Section 5.17 as provided herein shall constitute fulfillment of all liabilities of the parties under the Contract with respect to intellectual property indemnification.

6. Performance and Evaluation Subsequent to Work

6.01 Workmanship and Equipment Warranty

ESCO hereby assigns to the Customer all warranties of all equipment and materials used in the Work. Attachment 2 lists equipment and material warranties, however, failure to include any equipment or materials having a warranty neither excludes said equipment or materials from the provisions of this section nor ESCO's responsibilities hereunder. At, or before the Project Acceptance, ESCO shall provide Customer with a list of all serial numbered items of equipment installed as part of the Work.

ESCO warrants that, for a period of one year from a date of a Certificate of Substantial Completion ("Warranty Period"), the relevant equipment, materials and Work shall be new and free from defects in material, manufacture, workmanship and performance as set forth by the catalogs, bulletins and specifications included within ESCO's Response to the RFP or the Scope of Work, whichever is appropriate. If such defect occurs within the Warranty Period, ESCO shall correct and pay for correction of all defects including replacement or repair and all parts and labor.

ESCO warrants that, for any equipment or materials used in the Work with a warranty period in excess of one year, ESCO shall correct all defects including replacement or repair provided that ESCO's obligation is limited to the terms of the warranty and provided further that the Customer, by mutual consent with ESCO, may correct said defect.

No warranty liability shall attach to ESCO until Work has been substantially completed. ESCO's warranties expressly exclude any remedy for damage or defect caused by abuse, improper operation, unapproved modifications or improper repairs not performed by ESCO.

If ESCO, upon written notice from the Customer, fails to correct defective equipment, materials or Work within a reasonable period of time, but no less than seventy-two (72) hours, unless such defect is a condition deemed to endanger health or safety, is a fire hazard or would otherwise render the Premises unfit for occupancy, Customer may correct any defect and ESCO shall reimburse Customer for its reasonable expenses incurred in performing such correction subject to any limitations contained within this section. Conditions which are deemed to endanger health or safety are applicable provisions of the state or local sanitary code, fire hazards under applicable fire prevention regulations and codes and other emergency conditions that shall be addressed promptly and jointly, if necessary, by ESCO and Customer assuring that immediate precautions are taken to avoid risk to persons or property, immediate measures are taken to prevent deterioration of condition, occupants are alerted to any dangers or hazards, and steps for final correction taken within twenty-four (24) hours. Customer may take reasonable steps to protect the Premises or the Work on an emergency if it is not possible or reasonable to notify ESCO before taking such actions.

THE EXPRESS LIMITED WARRANTIES PROVIDED ABOVE ARE IN LIEU OF AND EXCLUDE ALL OTHER WARRANTIES, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS

FOR A PARTICULAR PURPOSE, WHICH, TO THE EXTENT PERMITTED BY LAW, ARE HEREBY EXPRESSLY DISCLAIMED. THE LIMITED EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS CONTRACT MAY ONLY BE MODIFIED OR SUPPLEMENTED IN A WRITING EXECUTED BY A DULY AUTHORIZED SIGNATORY OF EACH PARTY.

6.02 Evaluation of Savings Achieved

ESCO shall also prepare and deliver to Customer an annual report of the savings achieved at the Premises for each of the twelve-month periods specified in Attachment 4 in a form suitable for review and subsequent forwarding to the Customer and any consultant or auditor designated by Customer. ESCO shall include in such report, to the extent practicable, emissions reduction quantities or similar data attributable to or resulting from the Work and advise Customer on opportunities to achieve monetary benefits from such credits or attributes which shall be the property of Customer.

The Customer shall notify ESCO of substantive changes in the properties or the operation or occupancy thereof which could affect energy or water use. Such substantive change shall be agreed upon by the parties and incorporated in the determination and evaluation of savings.

The obligations under this Article are also described in Attachment 4. ESCO shall be compensated at the rate described in Attachment 3 for maintaining, monitoring and verification and reporting services.

6.03 Performance Guarantee

ESCO hereby guarantees the level of savings for the time periods and to the level described in Attachment 4 ("Performance Guarantee"). The Performance Guarantee commencement date shall not occur and the Customer shall not be required to accept the Work unless and until all equipment installation at the Premises and training is completed in accordance with the terms and conditions of this Contract, including, without limitation, the satisfaction of all claims for labor and materials. In the event that Final Acceptance occurs subsequent to the commencement date of the Performance Guarantee (See Attachment 4), then the parties will mutually agree on a modified Attachment 4 to accommodate the delay in commencing the Performance Guarantee.

The Performance Guarantee is to be achieved as a result of the Work and the ECMs/OCMs and the resulting savings, if any, shall be calculated in accordance with the procedures described in Attachment 4. The Performance Guarantee is subject to the satisfactory performance by Customer of all of its obligations under this Contract. In the event that this Contract is terminated by an uncured Event of Default by Customer, the Performance Guarantee shall be cancelled. The Performance Guarantee shall remain in effect for the first fourteen (14) years of the performance period, i.e., the period after the commencement of the Performance Guarantee, but in no event shall the term of the Performance Guarantee be less than the time required to finance the Work. The Performance Guarantee shall thereafter terminate. In any event, ESCO and Customer have structured the Energy Savings and the Performance Guarantee to be sufficient so that the conversion to US Dollars results in amounts sufficient to exceed any and all payments required by Customer in connection with the

acquisition of equipment to be installed by ESCO pursuant to this Contract, the Customer's lease or financing obligations and any related agreements associated with the execution of this Contract or the implementation of the Work.

ESCO shall have no liability to continue providing measurement and verification services or to honor the Performance Guarantee with respect to any portion of the Work in the event the Customer: (i) fails to authorize a reacceptance test or recommissioning that ESCO reasonably deems necessary in order to prevent a savings shortfall with respect to such portion of the Work; (ii) fails to provide access to a site where such portion of the Work was performed as required herein; (iii) fails service and maintain all equipment associated with such portion of the Work in accordance with the manufacturers' recommendations in order to prevent a savings shortfall; or (iv) cancels or terminates the Performance Assurance TSP.

6.04 Performance Remedies

Energy-related cost savings shall be measured and/or calculated as specified in the measurement and verification plan provided in Attachment 4 or as may be mutually agreed upon in writing. In the event that the energy and cost savings achieved during such twelve-month period is less than the corresponding Guaranteed Savings for the same annual period as reflected in Attachment 4 while the Performance Guarantee is in effect, ESCO shall pay to Customer within thirty (30) days of the delivery of such report an amount equal to the deficiency. ESCO shall be afforded up to ninety (90) days in which to remedy such non-conformance at no additional cost to Customer. Energy Savings shall be measured again in accordance with the requirements of the measurement and verification plan provided in Attachment 4. If, despite ESCO's efforts, ESCO has failed to remedy such non-conformance, ESCO shall pay such deficiency with interest pursuant to Section 4.02. All costs associated with having the ECMs/OCMs repaired, replaced, adjusted or re-engineered and re-installed shall be paid by ESCO and presentation of evidence of such payment shall be a condition to any Customer approval of such work. If during any twelve-month period specified in Attachment 2 and Attachment 4 the savings achieved are greater than the Guaranteed Energy and Cost Savings, such excess shall be retained by the Customer and not applied to ESCO's requirement to deliver Energy Savings beyond the stated year.

6.05 Security for Performance Guarantee

ESCO shall provide security for the guaranteed savings to the Customer in one or more of the following forms as mutually acceptable to ESCO and the Customer and as specified in Attachment 12:

- 1) An efficiency bond, so called, prepaid and renewable annually in a face amount equal to the annual projected guaranteed savings, said bond to be placed with a regulated financial institution with a Best Rating of not less than A, or a comparable rating from a recognized financial rating firm;
- 2) Escrow account equal to the annual projected guaranteed savings; or
- 3) Letter of credit, prepaid for an amount equal to the annual projected guaranteed savings, from a regulated financial institution with a Best Rating of not less than A, or a comparable rating from a recognized financial rating firm.

- 4) A guarantee in an amount equal to the annual projected guaranteed savings from a corporate entity affiliated with ESCO (e.g., ESCO's parent) with a credit rating of at least "A" from Standard & Poors or a rating of at least "A2" from Moodys.

The Customer may waive, at its discretion, the security requirements herein provided in the event that:

- 1) The actual savings have met or exceeded projected or guaranteed savings for a period of not less than three years;
- 2) The actual savings in the most current year exceed projected or guaranteed savings by not less than 50%;
- 3) All Work and equipment are functioning as intended and no extraordinary shutdowns or replacements are anticipated;
- 4) The financial condition of ESCO, as indicated by standard financial ratio tests applied to audited statements which include contingent liabilities for other Contracts of this kind, is at least as strong as the financial statement submitted with ESCO's Response to the RFP;
- 5) The savings incurred as a result of this waiver inure to the benefit of the Customer; and
- 6) Said waiver may be cancelled by the Customer upon thirty (30) written notice to ESCO at which time ESCO shall provide security as required herein.

6.06 Independent Audit

The Customer shall have the right to retain, at its own expense unless the audit demonstrates a variance of more than ten percent (10%) in favor of the Customer in which case ESCO shall reimburse Customer for such cost or an offset may be made against amounts due pursuant to Attachment 3, an independent certified public accountant or other independent expert to complete and submit to the parties an audit of the calculations of energy and operational savings made pursuant to this Contract. At the Customer's option, any such audit may also be performed by Customer's internal audit department subject to appropriate audit standards. Any audit so performed must use and incorporate the same methods, procedures, and assumptions as contained in this Contract and used by ESCO to perform the calculations undergoing an audit pursuant to this Section. Any payments between the parties necessary to resolve any irregularities identified in the audit shall be made within thirty (30) days after submission of the audit to the parties. If, after thirty (30) days, the parties are unable to agree upon the adjustment, the matter shall be submitted to resolution pursuant to Section 9.01, and the disputed portion of any additional payment due under this Section shall not be payable until the dispute resolution procedure required in Section 9.01 has been completed.

6.07 Other Performance Terms and Conditions

All actions taken under Section 6, including but not limited to correction of warranties, remedy of performance shortfalls and maintenance of equipment by ESCO, shall conform with sections 5.02 through 5.17 inclusive.

6.08 Contract Closeout Responsibility

At the termination of the Contract, ESCO shall perform a walk-through survey of the properties covered by this Contract and prepare an assessment of the condition of the equipment and materials installed as part of the Work and subsequent thereto under this Article. This closeout report shall include but not be limited to the following, as appropriate:

- 1) Operating and maintenance recommendations during the remaining life of equipment installed if different from requirements furnished upon installation or if changes in technology or procedures affecting the equipment could extend the useful life of the equipment or increase the conservation efficiency,
- 2) An overview of new technology or additional conservation measures for the Customer to consider.

7. Obligations of the Parties

7.01 Obligations of ESCO

ESCO acknowledges and agrees that ESCO's obligations hereunder are in the capacity of providing professional services for the purposes described in the Preamble to this Contract and in said capacity is expected to provide energy, water and operational auditing, engineering, design and monitoring services, construction management including general contracting as necessary, and other related services as solicited in the RFP and as may normally be incidental to these types of professional services. ESCO acknowledges and agrees that any other functions, including, but not limited to, manufacturer's representative, dealer or distributor of equipment, materials or commodity specified herein or as subcontractor, or any ownership interest in whole or in part, or financial affiliation with a company that performs such other function shall constitute a conflict of interest which shall constitute a material breach of this Contract unless 1) fully disclosed in ESCO's Response to the RFP, and 2) accepted by the Customer under terms which are specified in the Scope of Work. ESCO acknowledges and agrees that this paragraph applies to all its officers and employees.

The following events or conditions shall, without limitation, constitute a breach by ESCO and shall give the Customer the right, without an election of remedies, to proceed pursuant to Section 9.01 and/or terminate this Contract by delivery of written notice declaring termination, upon which event ESCO shall be liable to the Customer for any and all damages sustained by the Customer:

- 1) Any attempt by ESCO to increase the Contract price for reasons other than those related to changes in the Work pursuant to Section 5.03;

- 2) Any failure by ESCO to provide quarterly monitoring reports pursuant to Section 6.02 provided that such failure continues for ten (10) days after notice from Customer;
- 3) Any failure by ESCO to make payments pursuant to the Performance Guarantee or to remedy a shortfall in the Performance Guarantee savings pursuant to Section 6.04 provided that such failure continues for three (3) business days after notice from Customer;
- 4) Any representation or warranty furnished by ESCO in ESCO's Response to the RFP, the Scope of Work or this Contract which is false or misleading in any material respect when made;
- 5) Any state, county or federal license, authorization, waiver, permit, qualification or certification by statute, ordinance, law or regulation to be held by ESCO to provide the goods or services required by this Contract is denied, revoked, debarred, excluded, terminated, suspended, lapsed or not renewed;
- 6) The filing of bankruptcy by ESCO or by ESCO's creditors, an involuntary assignment for the benefit of creditors, or the liquidation of ESCO;
- 7) Any failure by ESCO to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, ESCO fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible;
- 8) Any failure to maintain the Standards of Comfort and service set forth in Attachment 8 due to the failure of ESCO to properly design, install, maintain, repair or adjust the equipment installed and maintained as part of the Work except that such failure, if corrected or cured within seven (7) days after written notice by Customer to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;
- 9) Any failure to furnish and install the equipment or ECMs/OCMs or perform the Work and make it ready for use within the time specified by this Contract as set forth in Attachment 2;
- 10) Any lien or encumbrance upon the equipment or the Premises by any subcontractor, laborer or materialman of ESCO which is not released in thirty (30) days;
- 11) Any failure by ESCO to pay any amount due or perform any material obligation under the terms of this Contract; and
- 12) It is determined that ESCO has failed to disclose a material conflict of interest relative to the performance of this Contract or if it is found that any gift or gratuity were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the

Customer with a view forward securing a contract or favorable treatment with respect to performance of the Contract.

7.02 Obligations of the Customer

Customer shall respond to all audits, proposed revisions and related requests on a timely basis for the expeditious design, implementation and monitoring of conservation measures. Furthermore, Customer shall comply with the Customer Responsibilities as are detailed in Attachment 2.

Each of the following events or conditions shall constitute a breach by Customer and shall give ESCO the right, without an election of remedies to proceed pursuant to Section 9.01 and terminate this Contract by delivery of written notice declaring termination, upon which event the Customer shall be liable to ESCO for all Work furnished to date:

- 1) Any failure by the Customer, without cause, to authorize payment due more than thirty (30) days after receipt of notice that the Customer is delinquent in making payment;
- 2) Any representation by Customer in the RFP and this Contract is false or misleading in any material respect when made; and
- 3) Any failure by the Customer to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to the Customer demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, the Customer fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible.

8. **Insurance and Bond Requirements**

8.01 Worker's Compensation Insurance

ESCO shall provide during the life of this Contract Worker's Compensation Insurance as follows:

Workers Compensation Coverage A	Statutory Minimum
Employer's Liability Coverage B	\$500,000 each accident \$500,000 disease per employee \$500,000 disease policy

8.02 Comprehensive General Liability

ESCO shall provide Comprehensive General Liability with the following minimum coverage with respect to the Work and other operations performed by ESCO and its employees, subcontractors, supplier's agents and invitees:

Bodily Injury and Property Damage	\$1,000,000 each occurrence, \$1,000,000 aggregate
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Products and Completed Operations	\$1,000,000 each occurrence, \$1,000,000 aggregate
Contractual Liability and Property Damage	\$1,000,000 each occurrence, \$1,000,000 aggregate

8.03 Vehicle Liability

ESCO shall provide the following minimum coverage with respect to the operations of the any employee, including coverage for owned, non-owned, and hired vehicles:

Bodily Injury	\$1,000,000 each occurrence
Property Damage	\$1,000,000 each occurrence
Combined Single Limit	\$1,000,000

8.04 Property Coverage

ESCO shall provide the following coverage against loss or damage by fire and against loss or damage covered by the special perils insurance endorsement on all Work:

All Risk	80% of Contract Price minimum
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Upon completion of Work at Customer buildings, ESCO shall provide an installation floater, in the full amount of the Contract Price, for the requirements set forth above. The policy or policies shall specifically state that they are for the benefit and payable to the Customer, ESCO, and all persons furnishing labor or labor and materials for the Work, shall be listed as loss payee as their interests may appear.

8.05 Professional Liability Insurance

ESCO shall maintain in full force and effect, at ESCO's expense, an Errors and Omissions or Professional Liability Insurance Policy in the amount of \$1,000,000 minimum coverage. The policy shall remain in effect for the duration of the applicable statute of limitations for claims against construction professionals. ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys fees, arising out of or resulting from the performance of professional services contemplated by this Contract, provided that any such claim is attributable to bodily injury or death, or injury to or destruction of tangible personal property, or to failures of the Work, including the loss of use resulting therefrom, and is caused, in whole or in part, by any negligent act, error or omission of ESCO, any consultant or associate thereof, anyone directly or indirectly employed by ESCO. ESCO shall submit a Certificate of Insurance verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.

8.06 Environmental Impairment Liability Insurance

ESCO shall maintain in full force and effect, at ESCO's expense, a Sudden & Accidental Environmental Impairment Liability Insurance Policy in the amount of \$1,000,000 minimum coverage unless comparable coverage is provided pursuant to the policy required in Section 8.05. The policy shall remain in effect for the duration of the applicable statute of

limitations for claims against construction professionals. ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys fees, arising out of or resulting from the cleanup, removal, and handling of hazardous materials contemplated by this Contract and is caused, in whole or in part, by any negligent act, error or omission of ESCO, any consultant or associate thereof, anyone directly or indirectly employed by ESCO. ESCO shall submit a Certificate of Insurance verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.

8.07 Customer as Additional Insured

The Customer shall be named as additional insured on ESCO's Liability Policies.

8.08 Certificates of Insurance, Policies

Certificates of insurance, acceptable to the Customer, shall be submitted to the Customer upon the execution of this Contract and shall be renewed upon expiration of the policies. Certificates shall indicate that the coverage required by section 8.01 through 8.06 is in effect. If the Customer is damaged by ESCO's failure to maintain such insurance, then ESCO shall be responsible for all reasonable costs or damages attributable thereto. Certificates shall note the thirty (30) day cancellation notice requirement of Section 8.08. All policies shall be issued by companies authorized to write that type of insurance under the laws of the State of Rhode Island. Any and all deductibles and self-insured retention contained in any insurance policy shall be assumed by and at the risk of ESCO.

8.09 Cancellation

Customer shall be provided notice of cancellation at least thirty (30) days prior to the effective date thereof for any insurance policy required of ESCO by this Contract.

8.10 Waiver of Subrogation

The Customer and ESCO waive all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, for damage caused by fire or other causes to the extent covered by insurance obtained pursuant to this Section 8 or other insurance applicable to the Work. The Customer or ESCO, as appropriate, shall require of consultants, separate contractors, subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of the other parties enumerated herein.

8.11 Bonds

ESCO shall provide the Customer with payment and performance bonds and efficiency bonds unless waived by Customer pursuant to Section 6.05, so called, to cover the full term and value of the Contract and issued by a regulated financial institution with a Best Rating of not less than A, or a comparable rating from a recognized financial rating firm, as follows:

- 1) Performance and payment bonds shall secure 100% of the Contract Price (these bonds apply only to the Work to be performed, and do not cover any guaranteed savings), and

- 2) Efficiency bond, so called, shall be secured for 100% of the annual guaranteed savings and may be renewed annually, except as otherwise provided in Section 6.05.

Any performance and payment bonds shall be maintained in full force and effect by ESCO until Project Acceptance. Customer agrees that upon Project Acceptance any performance and payment bonds shall be released and any obligations arising thereunder shall be terminated. AIA bond forms may be employed.

9. General Provisions

9.01 Dispute Resolution

Disputes regarding changes in and interpretations of the terms or scope of the Contract and denials of or failures to act upon claims for payment for extra work or materials shall be resolved according to the following procedures:

- 1) All claims by ESCO shall be made in writing and submitted to the Customer for a written decision.
- 2) ESCO shall not delay, suspend, or curtail performance under the Contract as a result of any dispute subject to this section.
- 3) Within sixty (60) days of submission of the dispute to the Customer, the Customer shall issue a written decision stating the reasons therefor, and shall notify the parties of their right of appeal under this section. If the official of the Customer is unable to issue a decision within sixty (60) days, he shall notify ESCO in writing of the reasons and of the date by which the decision shall issue.
- 4) Failure to issue a decision within one hundred and twenty (120) day period or within the additional period specified in such written notice shall give the petitioner the right to pursue any legal remedies available to him without further delay.
- 5) ESCO and Customer agree that all disputes relating to this Contract and performance thereunder shall be resolved in the Business Calendar of the Superior Court, Providence County, Rhode Island and any appellate court from which an appeal may be taken therefrom. To the fullest extent permitted by law, the parties irrevocably and unconditionally submit to the exclusive jurisdiction of said court.

9.02 Conditions Beyond Control of the Parties

Except as otherwise provided herein, if either party shall be unable to carry out any material obligation under this Contract due to events beyond its control, such as acts of God, governmental or judicial Customer, insurrections, riots, extended labor disputes, fires, explosions or floods, this Contract shall remain in effect but the affected party's obligations shall be suspended until the uncontrollable event terminates or is resolved, unless the Contract is terminated by either party following a ninety (90) day delay, in which event, Customer shall pay ESCO for all parts of the Work furnished to the date of termination or as otherwise agreed.

9.03 Labor Laws

ESCO shall obey and abide by all laws and regulations of the State of Rhode Island relating to the employment of labor and public work, including, without limitation, the State's drug-free workplace policy (ESCO shall deliver to Customer a certificate of compliance with such policy).

ESCO shall comply with all federal and state laws, rules and regulations promoting fair employment practices or prohibiting employment discrimination and unfair labor practices. ESCO shall not discriminate in the delivery of services against any person who otherwise meets the eligibility criteria for services, or in the hiring of any applicant for employment nor shall any qualified employee be demoted, discharged or otherwise subject to discrimination in the tenure, position, promotional opportunities, wages, benefits or terms and conditions of their employment because of race, color, national origin, ancestry, age, sex, religion, disability, status as a Vietnam Era Veteran, sexual orientation or for exercising any rights or benefits afforded by law including the requirements of Federal Executive Orders 11246, 11625, 11375 and 11830 and Title 28 Chapter 5.1 of the General Laws of Rhode Island.

ESCO shall comply with the requirements of Title 37 Chapter 14.1 of the General Laws of Rhode Island with respect to Minority Business Enterprises, including the requirement that ten percent (10%) of the dollar value of work performed against contracts for construction exceeding \$5,000 shall be performed by Minority Business Enterprises where it has been determined that subcontract opportunities exist and where certified Minority Business Enterprises are available.

ESCO's failure to abide by these rules, regulations, contract terms and reporting requirements shall be grounds for forfeiture and penalties as shall be established, including, but not limited to, suspension.

9.04 Prevailing Wage Rate

ESCO shall and cause its Subcontractors to comply with the requirements of Title 37 Chapter 13 of the General Laws of Rhode Island with respect to the payment of the general prevailing rate of per diem wages, including regular, overtime and other working conditions existing in the locality for each craft, mechanic, teamster or type of workman needed to execute the work described in this Contract.

9.05 Appropriations

The Customer reasonably believes that funds can be obtained sufficient to make all payments due to ESCO under this Contract. The Customer hereby covenants that it will make reasonable and diligent efforts to obtain and maintain funds from which such payments may be made, including making provisions for such payments to the extent necessary in each annual or supplementary budget submitted for the purpose of obtaining funds, and using reasonable efforts to have such portion of the budget approved. Nothing herein shall obligate the Customer to institute legal action before any court, to commence proceedings before any forum, or to institute proceedings in the nature of mandamus against any public official in attempting to obtain said funds.

9.06 Laws, Regulations, Ordinances and Standard Practices

ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, regulations, ordinances and by-laws, including applicable licensing and permitting requirements, in accordance with sound engineering and safety practices, and in compliance with any and all reasonable rules or policies of the Customer relative to the properties. ESCO shall be responsible for obtaining all governmental permits, licenses, consents, and authorizations as may be required to perform its obligations hereunder (see also Section 5.10 regarding permits and fees pertaining to the Work).

9.07 Access and Inspection

Customer shall have access to inspect, upon reasonable notice, the Work and the books, records, and other compilations of data which pertain to this Contract. Records shall be kept on a generally recognized accounting basis and calculations kept on file in legible form. Records shall be saved or archived by ESCO for a period of three (3) years after the termination of this Contract and shall be kept or made available within Rhode Island.

ESCO shall have access, upon reasonable notice to the Customer, to inspect the property to assess the condition and operation of material and equipment installed.

9.08 Ownership Rights

All drawings, reports and other materials prepared by ESCO specifically in performance of this Contract shall become the property of the Customer as needed or upon the termination of the Contract. Customer shall be entitled to any currently or future available credits other than those agreed to by the Parties to be assigned to the ESCO, i.e. utility rebates, or rights of use associated with the reduction of energy use, particular technologies employed in or any attributes associated with the Work.

9.09 Certificates

ESCO certifies as follows:

- 1) Certificate of Authorization: If ESCO is a corporation, each person executing this Contract on behalf of ESCO hereby covenants, represents and warrants that ESCO is a duly incorporated or duly qualified (if foreign) corporation and is authorized to do business in the State of Rhode Island (a copy of evidence thereof to be supplied to the Customer upon request); and that each person executing this Contract on behalf of ESCO is an officer of ESCO and that he or she is duly authorized to execute, acknowledge and deliver this Contract to the Customer, a copy of a corporate resolution to this effect is attached hereto as Attachment 9.
- 2) Tax Compliance Certification: Each person signing this Contract on behalf of ESCO hereby certifies, under the penalties of perjury, that to the best of his/her knowledge and belief, ESCO has complied with any and all applicable state tax laws.
- 3) Certificate of Non-collusion: The undersigned certifies under penalties of perjury that this Contract has been made in good faith and without

collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity of group of individuals.

- 4) Foreign Corporation: ESCO, if a foreign corporation, hereby certifies that it is in compliance with Title 7 Chapter 1.1 of the General Laws of Rhode Island and that the name and address of the resident agent is included with Attachment 9.

9.10 Assignment

ESCO shall not assign, transfer, convey, or otherwise dispose of this Contract, or any part hereof, or his right, title or interest in the same or any part thereof, without the prior written consent of the Customer provided, however, that Customer may not unreasonably withhold or delay its consent to an assignment of its interest in this Contract to a corporate affiliate and provided further that ESCO may without the consent of Customer assign its rights for payments under this Contract to any financial institution, lender or investor in connection with a leasing or financing arrangement for the ECMs/OCMs. ESCO shall not otherwise assign by power-of-attorney, or otherwise, any of the moneys due or to become due and payable under this Contract, without the prior written consent of the Customer.

9.11 Applicable Law and Severability

This Contract is made and shall be interpreted and enforced in accordance with the laws of the State of Rhode Island. If any provision of this Contract shall be determined to be invalid or unenforceable under applicable law, such provision shall, insofar as possible, be construed or applied in such manner as will permit enforcement; otherwise this Contract shall be construed as if such provision had never been made part thereof.

9.12 Independent Contractor

The Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither the Contractor nor any agent or employee of the Contractor shall be deemed to be an agent or employee of the State of Rhode Island or any agency of subdivision thereof. Contractor shall be responsible for all payroll taxes and benefits for its employees.

9.13 Complete Contract

This Contract, together with any documents incorporated herein by attachment as an exhibit or by reference, shall constitute the entire and exclusive Contract between both parties, except as may be provided by relevant law or regulation, and supersedes and terminates all prior or contemporaneous arrangements, understandings and agreements, whether oral or written, and this Contract may not be amended or modified except in writing and executed by the Customer and ESCO. The RFP and ESCO's response thereto are incorporated by reference to the extent not superceded by the Scope of Work or this Contract.

The failure of either ESCO or the Customer to insist upon the strict performance of any term or condition hereof shall not constitute or be construed as a waiver or relinquishment of either party's right to thereafter enforce the same in accordance with this Contract.

9.14 Further Documents

The parties shall timely execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

9.15 Counterparts

This Contract may be executed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument, and in making proof of this Contract it shall not be necessary to produce or account for more than one such counterpart.

10. Contract Signatures

IN WITNESS THEREOF, the parties have each caused this Contract to be executed in counterparts on the dates set forth below (the last of which shall be considered the date of execution hereof) by their duly authorized representatives.

STATE OF RHODE ISLAND,
DEPARTMENT OF ADMINISTRATION

Name: _____

Name: _____

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

ATTACHMENT 1

Description of Premises

ATTACHMENT 2

Scope of Work

Description of ECMs/OCMs, Equipment and Material Warranties and Project Schedule

Note: references to Attachment 12 and to Attachment 13 within this Attachment 2 are intended to refer to specific attachments included within this Attachment 2.

ATTACHMENT 3

Payment Schedule

ATTACHMENT 4

Measurement and Verification Plan and Performance Guarantee

Note: Sheets entitled Calculated Savings and Factored Savings provided herein are incorporated in Attachment 4 and provide back up for the calculations provided herein.

ATTACHMENT 5

Equipment Standards for ECMs/OCMs

ATTACHMENT 6

Specialized Construction or Operational Requirements

ATTACHMENT 7

Hours Available for Performing the Work

ATTACHMENT 8

Comfort Standards

ATTACHMENT 9

Evidence of ESCO Corporate Authority
and
Qualification of ESCO as a Foreign Corporation, if Necessary

ATTACHMENT 10-A

Delivery and Acceptance Certificate
Upon Substantial Completion

(“ESCO”) warrants that certain ECMs/OCMs described in Attachment 2 to the Contract between ESCO and State of Rhode Island, Department of Administration (“Customer”) dated _____ and which are listed in the attachment hereto are fully installed and in good working condition consistent with the requirements of the Contract, and Customer has accepted the same as indicated by its signature hereon.

Substantial Completion Date: _____

ECMs/OCMs: _____

ESCO Signature: _____

Name: _____

Title: _____

Customer accepts that the ECMs/OCMs listed below are substantially complete.

ECMs/OCMs: _____

Customer Signature: _____

Name: _____

Title: _____

Customer rejects the ECMs/OCMs listed below are not substantially complete.

ECMs/OCMs: _____

Customer Signature: _____

Name: _____

Title: _____

ATTACHMENT 10-B

Delivery and Acceptance Certificate
Upon Final Completion

(“ESCO”) warrants that all of the ECMs/OCMs described in Attachment 2 to the Contract between ESCO and State of Rhode Island, Department of Administration, dated _____ and which are listed in the attachment hereto are fully installed and in good working condition consistent with the requirements of the Contract. Also attached hereto is a statement evidencing that all items on the Checklist for Project Acceptance located in Attachment 11 are complete and a Final Commissioning Report.

Final Completion Date: _____

ESCO Signature _____

Name _____

Title: _____

ATTACHMENT 11-A

Guidelines for Project Acceptance

ECM/OCM Installation. All ECMs/OCMs are installed in accordance with plans, specifications, standards, and other contract documents agreed upon by Customer and ESCO.

Inspection, start-up, testing and commissioning. All ECMs/OCMs are inspected, brought on line, tested, and commissioned interactively with all related Customer-owned or ESCO-installed ECMs/OCMs. The ECMs/OCMs should be operating in accordance with the design, plans, specifications, standards and other contract documents and manufacturer's recommendations. Individual ECMs/OCMs may go through start-up and testing, but all interrelated ECMs/OCMs must be installed prior to commissioning. The ESCO shall be involved in the final inspection and commissioning process along with any subcontractors. The Customer should accompany the ESCO on these inspections.

Punch list generation. A punch list is generated during inspection to document items needing fixing or deficiencies, and punch list items are corrected.

30-day Performance Period. Upon completion of the above items for the last installed ECMs/OCMs, the ESCO shall write a letter to the Customer asking for the 30-day performance period to begin (assuming all significant punch list items have been corrected). Other discrepancies may appear during this period. The ESCO shall have them all corrected by the end of the 30-day period. If the discrepancy has the potential to reappear or if another 30-day period is warranted because of the criticality of the ECM/OCM, then a continuation of the performance period may be requested.

Measurement and Verification. Measurement and verification post-installation measurements are taken and measurement and verification protocols are in place; in all cases a report is generated (all based on the measurement and verification plan in Attachment 4).

Final Customer Inspection. One final "walk-through" should be conducted with the Customer representative. The ECMs/OCMs should be fully operational, without "bugs" and all other items required for completion or delivery to the Customer shall have been provided.

Project Acceptance. The Customer signs and delivers a certificate that confirms that the items reflected in the checklist for project acceptance have been satisfied.

Checklist for Project Acceptance

- _____ All ECMs/OCMs have been installed.
- _____ All ECMs/OCMs have been through inspection, start-up, testing, and interactive commissioning.
- _____ All discrepancies noted have been corrected.
- _____ Appropriate training on operations and maintenance (O&M) was conducted for each ECM/OCM
- _____ O&M manuals and procedures have been provided.
- _____ Recommended spare parts lists and spares have been provided.
- _____ As-built drawings have been received and approved.
- _____ Post-installation measurement and verification report received and approved.
- _____ Utility rebate inspections and paperwork approved and submitted.
- _____ Manufacturer warranty and registration paperwork submitted.
- _____ Serial number information for relevant equipment submitted.
- _____ All ECMs/OCMs have performed properly for 30 days as of _____.
- _____ Customer final inspection and acceptance is confirmed as of _____.

ATTACHMENT 11-B

Delivery and Acceptance Certificate
Upon Project Acceptance

_____ (“Customer”) hereby acknowledges Project Acceptance of all ECMs/OCMs described in Attachment 2 to the Contract between Customer and _____ (“ESCO”) dated _____. The date of delivery of this certificate of Project Acceptance is the date at which the Customer shall be deemed to have the Work defined in the Contract has been installed, functionally tested and all punch list items completed in accordance with the Contract, so that the Customer has possession of the Work and can use it for its intended use. Customer hereby accepts the ECMs/OCMs listed hereto after full inspection thereof as satisfactory for all purposes of the Contract.

Final Acceptance Date: _____

ECMs/OCMs: _____

Accepted for: Customer

Accepted by: _____

Name: _____

Title: _____

ATTACHMENT 12

Security for Performance Guarantee

None